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Bank Pembangunan (M) Bhd v Limpo Sdn Bhd

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 24–881 OF 1993
JEFFREY TAN J
16 APRIL 1997

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Civil Law Act *— Assignment — Absolute assignment — Application for order for sale of property — Whether sale by public auction or by private treaty of assigned property should be allowed — Whether would be just, solely on technical objections, to refuse application*

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Contract *— Guarantee — Notice of demand — Demand for payment — Whether a proper demand has been made — Whether a demand for the precise amount outstanding is not sine qua non*

The defendant had assigned its property ('the property') situated in a complex — vide a third party deed of assignment ('the assignment') — to the plaintiff bank, giving the plaintiff rights to sell the property if the defendant failed to pay the moneys due and payable upon demand under a debenture. Upon a default, the plaintiff applied for an order for sale of the property. Counsel for the defendant opposed the plaintiff's application on two grounds, namely: (i) the sum sought was incorrect as a sum of RM137,331.41 had not been accounted for; and (ii) the demand was not a proper demand as the plaintiff demanded the sum of RM824,690.42 even though the statement of account stated that a sum of RM838,826.45 was due and owing on 30 November 1991. Counsel for the plaintiff submitted that a demand for the precise amount outstanding was not a sine qua non.

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Held, allowing the application:

(1) A demand is still a proper demand even if it does not specify the precise amount of the debt (see p 438H); *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305; *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283; *Bank of Baroda v Panessar* [1986] 3 All ER 751; *Banbury Foods Pty Ltd v National Bank of Australia Ltd* (1984) 51 ALR 609; *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 2 MLJ 482 and *Dikwa Holdings Pty Ltd v Oaksbury Pty* (1992) 8 ACSR 53 followed; *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178 and *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108 not followed.

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(2) On the facts, there was no basis to the claim that there was an uncredited difference. The receiver and manager had already accounted for that difference though it was totally overlooked by the defendant (see p 439D–G).

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(3) Since the defendant had pledged the property as security to the plaintiff by way of an absolute assignment, the plaintiff was entitled, as the contractual prerequisites had been met, to the

sale of the property by public auction or by private treaty. It would not be just, solely on technical objections and then not even sustained, to refuse the application (see pp 440I and 441A–E).

[Bahasa Malaysia summary

Defendan telah menyerahhak hartanahnya ('hartanah tersebut') yang terletak di sebuah kompleks — melalui satu suratikatan penyerahhakan pihak ketiga ('penyerahhakan tersebut') — kepada bank plaintif, yang memberikan plaintif hak untuk menjual hartanah tersebut jika defendan gagal untuk membayar wang yang kena dibayar dan terhutang apabila dituntut di bawah satu debentur. Setelah berlaku satu kemungkiran, plaintif telah memohon untuk mendapatkan perintah untuk jualan hartanah tersebut. Peguam bagi pihak defendan telah menentang permohonan plaintif itu atas dua alasan, iaitu: (i) jumlah yang dipohon adalah tidak betul kerana satu jumlah sebanyak RM137,331.41 telah tidak diambil kira; dan (ii) tuntutan tersebut bukannya merupakan satu tuntutan yang sempurna kerana plaintif telah menuntut jumlah sebanyak RM824,690.42 walaupun penyata akaun menyatakan bahawa satu jumlah sebanyak RM838,826.45 terhutang dan kena dibayar pada 30 November 1991. Peguam bagi pihak plaintif telah berhujah bahawa satu tuntutan untuk jumlah tepat yang masih belum dijelaskan bukannya satu sine qua non.

Diputuskan, membenarkan permohonan tersebut:

(1) Sesuatu tuntutan masih merupakan tuntutan yang sempurna walaupun jika ianya tidak menentukan jumlah tepat hutang tersebut (lihat ms 438H); *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305; *Co-operative Central Bank Ltd v Meng Kuang Properties* [1991] 2 MLJ 283; *Bank of Baroda v Panessar* [1986] 3 All ER 751; *Banbury Foods Pty Ltd v National Bank of Australia Ltd* (1984) 51 ALR 609; *YPJE Consultancy Services Sdn Bhd v Heller Factoring (M) Sdn Bhd (dahulunya dikenali sebagai Matang Factoring Sdn Bhd)* [1996] 2 MLJ 482 dan *Dikwa Holdings Pty Ltd v Oaksbury Pty* (1992) 8 ACSR 53 diikut; *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178 dan *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108 tidak diikut.

(2) Berdasarkan fakta-fakta, tiada asas kepada tuntutan bahawa terdapatnya perbezaan yang tidak dikreditkan. Penerima dan pengurus telah pun mengambil kira perbezaan itu walaupun ia telah tidak diberi perhatian oleh defendan (lihat ms 439D–G).

(3) Oleh kerana defendan telah menyandarkan hartanah tersebut sebagai jaminan kepada plaintif melalui satu penyerahhakan yang mutlak, plaintif adalah berhak, oleh kerana prasyarat kontraktual telah dipenuhi, kepada penjualan hartanah tersebut melalui lelong awam atau melalui triti persendirian. Ia tidak adil untuk menolak permohonan tersebut semata-mata atas bantahan teknikal yang tidak juga dipertahankan (lihat ms 440I dan 441A–E).]

A **Notes**

For a case on absolute assignment, see 1 *Mallal's Digest* (4th Ed, 1997 Reissue) para 2189.

For cases on demand for payment, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2299–2305 and 2344–2351.

B

Cases referred to

Banbury Foods Pty Ltd v National Bank of Australasia Ltd v National Bank of Australasia Ltd (1984) 51 ALR 609 (folld)

Bank of Baroda v Panessar [1986] 3 All ER 751 (folld)

C *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* [1988] 2 MLJ 62 (refd)

Co-operative Central Bhd v Meng Kuan Properties Bhd [1991] 2 MLJ 283 (folld)

Dikwa Holdings Pty Ltd v Oaksbury Pty (1992) 8 ACSR 53 (folld)

D *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149 (refd)

Imtiaz Ahmad v Ghulam Ali PLD (1963) SC 382 (refd)

KK Kumaran v TS Sambanthamurthi [1996] 3 MLJ 309 (refd)

Kwong Yik Bank Bhd v Transbuilder Sdn Bhd & Ors [1989] 2 MLJ 301 (refd)

E *Low Lee Lian v Ban Hin Lee Bank Ltd* [1997] 1 MLJ 77 (folld)

Mok Hin Wah v United Malayan Banking Corp Bhd [1987] 2 MLJ 610 (refd)

Nouvau Mont Dor (M) v Faber Development Sdn Bhd [1984] 2 MLJ 268 (refd)

Oldham v Stringer (1885) 51 LT 895 (refd)

F *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd* [1989] 3 MLJ 155 (refd)

Perusahaan Jenwatt Sdn Bhd, Re [1990] 2 MLJ 178 (not folld)

Public Bank Bhd v Chan Siok Lie & Ors [1989] 2 MLJ 305 (folld)

Tweeds Garages Ltd, Re [1962] 1 Ch 406 (refd)

G *United Malayan Banking Corp Bhd v Chong Bun Sun and another application* [1994] 2 MLJ 221 (refd)

Yap Kim Kee & Sons Sdn Bhd, Re [1990] 2 MLJ 108 (folld)

YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd) [1996] 2 MLJ 482 (folld)

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Legislation referred to

Companies Act 1965 s 281

Civil Law Act 1956 s 4(3)

I National Land Code 1965 s 257

Rules of the High Court 1980 O 31 r 1(1)

Rules of the Supreme Court 1965 O 51 [Eng]

Wong Fei Hong (*Prasad Abraham & Associates*) for the plaintiff.

Tan Lip Gay (*Leong Ng & Tan*) for the defendant.

Cur Adv Vult A

Jeffrey Tan J: This is the plaintiff's application (encl 17), inter alia, for an order for sale of Lot BII 2.01 Tingkat 1, Fasa I & II, Kompleks Tun Abdul Razak ('the said property').

The pertinent facts are as follows. On 18 August 1981, the defendant B purchased the said property from the Penang State Development Corp. On 8 December 1987, in consideration of the plaintiff's loan (RM750,000) to Silvercrest Technology Sdn Bhd who executed debenture, the defendant assigned, by a 'Third Party Deed of Assignment of Land' ('the said assignment'), all its 'rights, title, benefit, interest, advantage, and property' in the said property and held thereunder the said agreement dated 18 August C 1981 and all rights for enforcing the same unto the plaintiff. Clause 9 of the assignment provided, inter alia, that the plaintiff until issuance of a separate title and registration of a charge of the said property in favour of the plaintiff, shall have 'the sole, absolute and unfettered right and power to deal with the said property in any manner at its absolute discretion as D it thinks fit, including such right and power to sell the said property whether by public auction or by private contract as if it were the sole beneficial owner thereof, if Silvercrest or the defendant fails to pay the moneys due and payable upon demand under the debenture'. On 3 May 1993, on the petition of Dolomite Industries Co Sdn Bhd, vide Kuala Lumpur High Court D2–28–22–93, Silvercrest Technology Sdn Bhd was E ordered to be wound up. On 16 December 1991, the plaintiff demanded the sum of RM824,690.42 from the defendant. On 25 August 1993, the plaintiff demanded the sum of RM1,049,906.10 from the defendant. According to the plaintiff, the defendant did not respond to the said demands and did not deliver vacant possession of the said property to the F plaintiff. To date, a separate document of title in respect of the said property has not been issued.

Mr Tan for the defendant who conceded that the plaintiff has the right, by the provisions of the said assignment, to apply for an order for sale, opposed the plaintiff's application on two grounds. He contended G that the sum sought is incorrect and that the demand is not a proper demand. On the first ground, Mr Tan elaborated that a sum of RM137,331.41 has not been accounted for. Between 30 January 1991 to 30 July 1994, the receiver and manager of Silvercrest received a total of RM996,553.66 but only credited a sum of RM859,222.25. The difference, precisely RM137,331.41, was not explained. On the second ground, Mr Tan H contended that the plaintiff demanded the sum of RM824,690.42 even though the statement of accounts stated that a sum of RM838,826.45 was due and owing on 30 November 1991. Citing *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd* [1989] 3 MLJ 155, Mr Tan submitted that a proper demand is a sine qua non.

I

On the necessity of a proper demand, it is settled law that a proper demand to the guarantor is a condition precedent to suing the guarantor (see *Mok Hin Wah v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610), that a guarantor is entitled to a proper demand (see *Orang Kaya*

Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad, where the former Supreme Court enunciated that a guarantee 'must be construed according to the intention of the parties as expressed by the language they have employed, understanding it fairly in the sense in which it is used' and that the words 'on demand' are not devoid of meaning or effect but made the demand a condition precedent to suing the guarantor (following *Mok Hin Wah*) and that the mere filing of the writ and the service thereof is not a sufficient demand obliging the guarantor to pay (see *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad*; see also the appeal from *Kwong Yik Bank Bhd v Transbuilder Sdn Bhd & Ors* [1989] 2 MLJ 301, where the former Supreme Court allowed the guarantor's appeal against the decision of the trial judge who held that no antecedent demand was required to create a cause of action and that the mere filing of the writ and the service thereof was a sufficient demand obliging the defendants to pay).

Both counsel agreed that a proper demand is a sine qua non. But both differed as to whether a demand should be for the precise amount outstanding to constitute proper demand. Mr Tan proposed, the purport of his submission, that a demand for the actual amount outstanding is a sine qua non while Mr Woon for the plaintiff submitted, citing *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305 and *Co-operative Central Bank Ltd v Meng Kuan Properties Bhd* [1991] 2 MLJ 283, that a demand for the precise amount outstanding is not a sine qua non.

In *Bank of Baroda v Panessar* [1986] 3 All ER 751, the plaintiff demanded under the powers contained in a mortgage debenture, all moneys due but did not specify the actual amount owed. On the submission that the demand was invalid because the demand failed to specify the amount due, Walton J held, following the Australian case of *Banbury Foods Pty Ltd v National Bank of Australasia Ltd* (1984) 51 ALR 609, that the demand was valid. It was further observed (by Walton J) that knowledge of the precise amount of the sum outstanding is only required in the exceptional case, because in most cases, the debtor has no real means of paying off the sum, and it would be idle to put the creditor to what might be very considerable expense in ascertaining the precise amount due when there is no likelihood that the sum will represent a realistic target at which the debtor can aim (see *Paget's Law of Banking* (190th Ed) at p 245).

In *Banbury Foods Pty Ltd v National Bank of Australasia Ltd* (1984) 51 ALR 609, Branbury Foods Pty Ltd granted a debenture to the National Bank of Australasia to secure the repayment of money lent by the bank. By notice dated 5 April 1982, the bank demanded payment of the moneys then owing but did not specify the amount owing. Three days later, the bank handed to an officer of the company a letter giving details of the debt which overstated the amount owing. The company and its director thereupon contended that the notice was bad because it did not specify the amount payable and that this omission was not cured by the subsequent letter which overstated the amount owing. In rejecting the contention, the High Court of Australia said at p 619:

> The foregoing examination supports the view that the interests of the parties will be more adequately protected by the principle that the debtor must be allowed a reasonable opportunity to comply with the demand before the creditor can enforce or realize the security than the adoption of the suggested proposition that the notice of demand must specify the amount of the debt. In determining whether the debtor has had such an opportunity, it will be relevant to take account of the debtor's knowledge or lack of knowledge and means of knowledge of the amount due and of the information which the creditor has provided in that respect, including the response which he has made to any inquiry by the debtor.

Apparently, 'the principle enunciated in [*Banbury*] has been applied in our court' (*Co-operative Central Bank Ltd v Meng Kuan Properties Bhd* [1991] 2 MLJ 283 at p 286, per Lim Beng Choon). In the latter case, Lim Beng Choon J observed that the principle enunciated in *Banbury* was applied in *Public Bank Bhd v Chan Siok Lie & Ors* where Shankar J said at p 308:

> ... [T]here is no general rule that in all cases, regardless of the terms of the document, a prior precise demand is a sine qua non to the commencing of an action.

And while agreeing with the principle enunciated in *Banbury* — but rejecting the contention that the notice of demand and the statutory notice in Form 16D were invalid because the sum mentioned in both notices exceeded the actual sum owed and payable by the borrower — Lim Beng Choon J said, at p 286:

> I am not saying that in no circumstances can a chargor challenge a notice or demand. He can certainly mount a challenge if he or the borrower (in the case of a third party charge) is in a position to pay off the sum demanded and wishes to know the exact and precise sum and he had communicated with the creditor and asked the creditor what sum he was required to pay.

Hence, the essential principle, with regard to a demand to a debtor or guarantor, is that the debtor/guarantor be given reasonable opportunity to comply with the demand before the creditor can enforce or realize the security rather than that the demand must specify the precise amount of the debt. In determining whether the debtor/guarantor has had such an opportunity, it would be relevant to take account of the debtor's knowledge, lack of knowledge and means of knowledge of the amount due and of the information which the creditor has provided in that respect, including the response which he has made to any inquiry by the debtor. A demand is still a proper demand, even if it does not specify the precise amount of the debt. The latter is also true of a notice, in effect a demand, under s 218 of the Companies Act 1965.

In *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178 and *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108, it was respectively held that the letter of demand was bad because, amongst other reasons, the amount demanded was more than the amount in the petition. However, in *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 2 MLJ 482, the Court of Appeal held, in agreeing with Wilcox J in *Dikwa Holdings Pty Ltd v*

Oaksbury Pty (1992) 8 ACSR 53 but overruling *Re Perusahaan Jenwatt Sdn Bhd* and *Re Yap Kim Kee* that 'even if the notice over-stated the amount owing, it is still legitimate to look at the circumstances in order to determine the critical issue upon which the application depends, namely whether or not the company is unable to pay its debts'. 'Where there is no doubt ... that the petitioner is a creditor for a sum which would otherwise entitle him to a winding-up order, a dispute as to the precise sum which is owed to him is not of itself a sufficient answer to the petition' (*Re Tweeds Garages Ltd* [1962] 1 Ch 406 at p 414).

It all adds up, quite emphatically, that the proposition that there must be a precise demand of the actual amount of the debt, on the facts and circumstances of the instant case, cannot be sustained. The same can be said of the other ground of objection to the order or sale — the so-called missing RM137,331.41.

The defendant contended that the receiver and manager received the aggregate sum of RM996,553.66 between 20 January 1991 to 13 July 1994 but only credited the aggregate sum of RM859,222.25. The defendant also contended that the receiver and manager had not accounted for the difference, of RM137,331.41, a difference, according to the defendant, that would reduce the outstanding account.

However, with respect, the receiver and manager had already accounted for that difference. His accounts disclosed that the total sum of RM996,553.66 was received between 20 May 1991 to 13 July 1994 (see encl 26 pp 8–35). His accounts disclosed that a total sum of RM859,222.25 was paid out towards repayments, the so-called credits, between 8 March 1988 to 13 April 1995 (see encl 24 p 15). And his accounts also disclosed, though it was totally overlooked by the defendant, that an aggregate sum of RM142,099.75 was paid out towards charges between March 1991 to 12 September 1995 (see encl 24 p 16). Clearly, the total receipt of RM996,553.66 was not enough to meet the repayment of RM859,222.25 and charges of RM142,099.75. Hardly could it be said, since there is no basis to the claim, that there is an uncredited difference that would reduce the outstanding sum.

Mr Tan graciously conceded that the plaintiff has the right, by the provisions of the assignment, to apply to court for an order of sale. Albeit impliedly, he also conceded that the court has jurisdiction to make an order for sale of the said property. And Mr Tan, on that jurisdiction of the court, was not wrong.

In *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* [1988] 2 MLJ 62, the plaintiff bank applied to court for an order for sale of the property that the defendant borrower had assigned to the plaintiff. As in the instant case, the property was yet not held under a strata title. There, it was submitted by the defendant that the security document (deed of assignment), could be construed as a security relating to land or as a security relating to a chose in action. If the security document was a security relating to land, then the plaintiff's remedies could be restricted to the orders under s 257 of the National Land Code 1965. Since the security document was not in

the form prescribed by the National Land Code, then the plaintiff's claim must be dismissed. If the security document was a security relating to a chose in action, so it was submitted, then it was not open to the plaintiff to claim any beneficial interest. However, the learned judge Edgar Joseph Jr J (as he then was) held that the security document was an absolute assignment and a valid security and that the requirements of the National Land Code which concern security in respect of land held under registered title are without application to property not yet held under a registered title. The learned judge held furthermore that the court has jurisdiction under s 41 of the Specific Relief Act 1950 and/or the inherent jurisdiction to grant the declaration of the outstanding debt and the order for sale of the property consequential thereto, or else, if the security is not a security relating to a chose in action but a security relating to land, 'jurisdiction under O 31 r 1(1) of the Rules of the High Court 1980 ('the RHC') (adapted from O 51 of the English Rules of the Supreme Court 1965) to make an order for sale of the property: see *Oldham v Stringer* (1885) 51 LT 895'. On appeal (see *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149), the orders of the learned judge was affirmed by the former Supreme Court.

Their Lordships Visu Sinnadurai and James Foong JJ also had occasion to pronounce on O 31 of the RHC.

In *United Malayan Banking Corp Bhd v Chong Bun Sun and another application* [1994] 2 MLJ 221, the registered chargee applied to court for an order to sell the charged property by way of private treaty. Pertinent to the instant case, in refusing the order for sale by private treaty, Visu Sinnadurai J pronounced, at p 233, that O 31 of the RHC is applicable where an action is commenced for the sale of property not charged under the provisions of the National Land Code.

And in *KK Kumaran v TS Sambanthamurthi* [1996] 3 MLJ 309, where the plaintiff/claimant of a $^{15}/_{325}$ undivided share applied for the sale of the subject land and where it was argued by the defendant that O 31 r 1 RHC relates to an order for the sale of charged properties or where partition of land owed by co-proprietors cannot be effected, James Foong J pronounced that O 31 RHC has no relevance to charge actions and that the court have jurisdiction and power, by virtue of O 31 of the RHC, to order the sale of any land as the court deems necessary and expedient so to order.

Obviously, the court has jurisdiction, under O 31 of the RHC or *ex necessitate juris* as a matter of principle and rectitude, to order the sale of any land not held under a separate title but pledged as security. Otherwise, financiers who could not realize such security would not lend on such security while purchasers of properties awaiting issuance of separate titles would have to offer some other form of realizable security. Commercial development would have to be wound down. Needless to say, that is not the state of the law.

Now, back to the instant application, the defendant pledged the property as security to the plaintiff. It was an absolute assignment within the meaning of s 4(3) of the Civil Law Act 1956 (see *Nouvau Mont Dor M v*

Faber Development Sdn Bhd [1984] 2 MLJ 268). The defendant covenanted that the plaintiff shall have the right to sell the property by public auction or by private contract if Silvercrest or the defendant 'fails to pay the moneys due and payable upon demand under the debenture'. The plaintiff demanded for the moneys due and payable under the debenture. Those demands were not met nor responded. Accordingly, the plaintiff is entitled, as the contractual prerequisites have been met, to the sale of the property by public auction or by private treaty. There is no cause to the contrary and this court is obliged to order the sale of the property (*Low Lee Lian v Ban Hin Lee Bank Ltd* [1997] 1 MLJ 77). There are only technical objections.

On technical objections, in *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (fomerly known as Matang Factoring Sdn Bhd)* at p 492, Ahmad Fairuz JCA imparted this comment of Kaikaus J in *Imtiaz Ahmad v Ghulam Ali* PLD (1963) SC 382 at 400:

> The English system of administration of justice on which our own is based may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the form and not to the substance defeats substantive rights and is defective to that extent. The ideal must always be a system that gives to every person that [which] is his.

In the instant case, it would not be just, solely on technical objections and then not even sustained, to refuse the application.

It is therefore ordered that the said property be sold by public auction, the manner applied by the plaintiff, to recover the sum of RM582,554.60 (the sum due as at 31 March 1994) and interest thereon at the rate of 10% per annum from 1 June 1994 till date of realization. It is further ordered that the learned senior assistant registrar do settle the terms and conditions of the public auction.

Plaintiff's application allowed.

Reported by Mohd Rizal Abidin